Filed 11/30/12 P. v. Greer CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PAUL STEPHEN GREER, Defendant and Appellant.	H036635 (Santa Clara County Super. Ct. No. FF721011)

Defendant Paul Stephen Greer appeals a judgment following his plea of no contest to conspiracy to defraud a person of property (Pen. Code § 182, subd. (a)(4)),[1] and subornation of perjury under oath (§ 127), among other crimes. On appeal, defendant argues the court incorrectly set the amount of the restitution fine, and failed to award him one additional day of presentence conduct credit under section 2933.

STATEMENT OF THE FACTS AND CASE

As the result of the operation of a small claims "mill," in which multiple fraudulent actions for unpaid towing and storage fees were filed, defendant was charged with conspiracy to defraud a person of property (§ 182, subd. (a)(4)), three counts of subornation of perjury under oath (§ 127), 25 counts of attempted grand theft of property of value over $400 (§§ 664; 484; 487, subd. (a)), 14 counts of certification under penalty

[1] All further statutory references are to the Penal Code.

of perjury (§ 118), two counts of embezzlement by a bailee (§§ 487, 507), offering a forged or false document (§ 132), embezzlement by an agent (§§ 487, 506), and second degree burglary (§§ 459, 460, subd. (b)).

Pursuant to an agreement that he would be sentenced to an eight-year prison term, defendant pleaded no contest to all the charges against him. The court ordered defendant to pay restitution to several of his victims, and to pay a $10,000 restitution fine.

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant asserts the trial court erred in imposing the $10,000 restitution fine and in imposing presentence conduct credits under section 2933.

Restitution Fine

In this case, the court imposed the maximum restitution fine of $10,000 pursuant to section 1202.4. Defendant asserts that because the court used the statutory formula, that it was unaware of its own discretion in setting the final amount.

Here, the court stated that it intended to, "[o]rder a restitution fine of $10,000 imposed under the formula permitted by Penal Code section 1202.4 subsection (b), an additional parole revocation fine of $10,000[] [t]hat will be ordered suspended pursuant to section 1202.45 of the Penal Code."

Section 1202.4 provides that when a person is convicted of a crime, the court must order the defendant to pay a restitution fine unless the court finds extraordinary and compelling reasons for not doing so. (§ 1202.4, subd. (a)(1).) Former section 1202.4, subdivision (b)(1) (Stats. 2011, ch. 45, § 1) provided that the restitution fine mandated upon the conviction of a felony crime must be set at the discretion of the court, commensurate with the seriousness of the offense but not less than $200 and not more than $10,000. Subdivision (b)(2) provided that "[i]n setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars ($200)

multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." Subdivision (d) provides that in setting the fine in excess of the felony minimum, the court shall consider any relevant factors and it lists several nonexclusive factors, including the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any pecuniary or intangible losses, and the number of crime victims. Finally, section 1202.45 further requires the court to impose an additional parole revocation restitution fine in the same amount imposed under section 1202.4, subdivision (b), with the additional fine suspended unless and until parole is revoked.

The sentencing court has wide discretion in setting the amount of the restitution fine and the court is not required to make express findings or state its reasons on the record. (*People v. Urbano* (2005) 128 Cal.App.4th 396, 405-406.) We review the court's determination for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663.) A court generally abuses its discretion when it rules in an arbitrary, capricious, or absurd manner, or outside the bounds of reason of the particular law being applied, resulting in a miscarriage of justice. (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.) But abuse of discretion also occurs when the factual findings critical to the decision are not supported by the record. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.)

Defendant asserts the court was unaware of its discretion in setting the amount of the restitution fine, and as a result, defendant did not receive the court's exercise of " 'informed discretion.' " (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn 8.) Defendant infers the court's ignorance of its discretion through two facts. First, the fact that the court concluded that it "[would] not order attorney's fees" and that defendant

"does not have the ability to pay the criminal justice administration fee," demonstrates the court understood defendant did not have the ability to pay fines and fees. In addition, the fact that the court stated that it was relying on the statutory formula in setting the restitution amount, the court intended to impose a fine greater than $10,000. Specifically, defendant claims the court intended to impose a restitution fine of $94,400 based on the statutory formula of the product of $200 times 8 (number of years of imprisonment) times fifty-nine (number of felony counts of which defendant was convicted). Therefore, according to defendant, because the court was aware it did not have the ability to pay fines and fees, wanted to impose $94,400 for a restitution fine based on the statutory formula, and instead imposed the $10,000 maximum fine, the court did not know that it had the discretion to impose less than $10,000.

Beyond the inferences noted above, defendant does not demonstrate the court was unaware of its discretion in ordering a $10,000 restitution fine. Moreover, in the absence of a showing that the decision was irrational or arbitrary, the sentencing court is presumed to have acted to achieve legitimate sentencing objectives and to have followed the applicable law in making discretionary sentencing decisions. (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496.)

Presentence Credits Pursuant to Section 2933

Defendant asserts that he is entitled to one day of presentence conduct credit under section 2933 as amended effective September 28, 2010.

The Attorney General argues that it is the Department of Corrections and Rehabilitation, not the court, that is responsible for both calculating and granting credits under section 2933. (Compare *People v. Duff* (2010) 50 Cal.4th 787, 793 [at sentencing, "credit for time served, including conduct credit, is calculated by the court"]; with *People v. Johnson* (2004) 32 Cal.4th 260, 265 [defendant temporarily returned to jail while awaiting resentencing is not entitled to presentence conduct credits] and *People v.*

Buckhalter (2001) 26 Cal.4th 20, 33 [same].) We need not address that assertion, because defendant's contention fails on the merits in any event.

The original version of section 2933, enacted in 1983, authorized the reduction of a prison sentence of six months for every six months in "work, training or education programs established by the Department of Corrections." (Stats. 1982, ch. 1234, § 4, pp. 4551-4552.) In late 2009 the Legislature passed two amendments to both section 2933 and section 4019. The first legislation (Stats. 2009, 3rd Ex. Sess. 2009-2010, ch. 28, §§ 38, 50, pp. 4420-4421, 4427-4428) was signed by the Governor on October 10, 2009, but because it was enacted during a special session of the Legislature, it took effect on January 25, 2010, 91 days after the special session adjourned. (Cal. Const., art. IV, § 8, subd. (c)(1).) The second amendment was urgency legislation that took effect September 28, 2010. (Stats. 2010, ch. 426, §§ 1, 2, pp. 2086-2088.)

The first amendment of section 2933 eliminated from subdivision (a) of the statute the provisions for "worktime" credits and replaced them with what appear to be custody credits. "For every six months of continuous incarceration, a prisoner shall be awarded credit reductions from his or her term of confinement of six months . . . pursuant to regulations adopted by the [Department of Corrections and Rehabilitation]." (§ 2933, subd. (b); Stats. 2009, 3rd Ex. Sess. 2009-2010, ch. 28, § 38, pp. 4420-4421.) The first amendment also added subdivision (e) to section 2933, providing, "A prisoner sentenced to the state prison under Section 1170 shall receive one day of credit for every day served in a county jail, city jail, industrial farm, or road camp after the date he or she was sentenced to the state prison as specified in subdivision (f) of Section 4019." (Stats. 2009, 3rd Ex. Sess. 2009-2010, ch. 28, § 38, p. 4421.)

The second amendment, however, substantially revised the subdivision. (Stats. 2010, ch. 426, § 1, p. 2087.) The version on which defendant relies stated, in pertinent part: "(e)(1) Notwithstanding Section 4019 and subject to the limitations of this

subdivision, a prisoner sentenced to the state prison under Section 1170 for whom the sentence is executed shall have one day deducted from his or her period of confinement for every day he or she served in a county jail, city jail, industrial farm, or road camp from the date of arrest until state prison credits pursuant to this article are applicable to the prisoner."

As with the first amendment of section 4019 and unlike the concurrent amendment of section 4019, this revision of section 2933 did not expressly provide for prospective or retroactive application. To the extent that it provides some guidance, section 3 states that "[n]o part of [the Penal Code] is retroactive, unless expressly so declared." This statute has been interpreted as a rule of construction that applies when the legislative intent cannot otherwise be ascertained. (*In re Estrada* (1965) 63 Cal.2d 740, 746.) It embodies a presumption that a new statute operates prospectively absent either an express declaration of retroactivity or a clear and compelling implicit indication that the Legislature intended retroactive application. (*People v. Hayes* (1989) 49 Cal.3d 1260, 1274.)

Examining the text of the amendment and its legislative history, we see no express declaration of retroactivity for the amendments of section 2933 or 4019. Defendant asserts the fact that the September 28, 2010 amendment of the statute includes an express provision that section 4019 only applies prospectively, but is silent as to section 2933, the implication is that the Legislature intended the amendments to 2933 to apply retroactively.

We do not find the lack of express language providing for prospective application of section 2933 indicative of a legislative mandate to that effect. "Credit is a privilege, not a right. Credit must be earned . . . ." (§ 2933, subd. (c).) Section 4019, and now section 2933, subdivision (e), were designed at least in part to facilitate management of prisoners by motivating compliant behavior while in local custody. This objective cannot

be served by a retroactive application of the amendment of section 2933, as "it is impossible to influence behavior after it has occurred." (*In re Stinnette* (1979) 94 Cal.App.3d 800, 806 (*Stinnette*) [upholding expressly prospective application of section 2931 authorizing post-sentence good conduct credit for behavior in prison].) We will not ascribe such incongruous intent to the Legislature. Giving compliant prisoners extra credit for their past behavior would confer an unexpected windfall and unearned bonus on those who have already conducted themselves in the belief that they were earning two days of conduct credit for every four days of good behavior in custody. Finding no compelling indication of retroactive application, we conclude that the second amendment of section 2933 is prospective, not retroactive, just as when similar language was added to section 4019.

Defendant also asserts failure to apply the amendments to section 2933 to all prisoners regardless of the date of commitment violates equal protection. Defendant contends there are two classes of state prisoners. Specifically, those entitled to conduct credits under the amended statute after the effective date of September 28, 2010, and those entitled to conduct credits under the amended statute prior to the effective date of September 28, 2010. Defendant argues both classes of prisoners are similarly situated with respect to the legislative purpose of increasing the rate at which prisoners can earn conduct credit. Therefore, under the principles of equal protection, the two classes of prisoners cannot be treated differently.

Both the federal and state Constitutions guarantee the right to equal protection of the laws. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.) " ' "The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." ' [Citation.]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) Since the amendments to section 2933 do not involve a " ' " 'suspect classification[]' " ' " or a

" ' " 'fundamental interest[],' " ' " courts apply the rational basis test to determine whether the "distinction drawn by the challenged statute bears some rational relationship to a conceivable legitimate state purpose." (*Stinnette, supra,* 94 Cal.App.3d at p. 805.

In *People v. Brown* (2012) 54 Cal.4th 314, the California Supreme Court rejected a similar equal protection argument with respect to a previous version of section 4019. The court held that prospective-only application of the new version of the statute did not violate equal protection because the purpose of the statute was to create an incentive for good behavior, which could not be done retroactively. (*Id.* at p. 330) The same is true with respect to the application of the amendments to section 2933. We therefore reject defendant's equal protection claim.

DISPOSITION

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.